IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

YAIR JOAQUIN GRANADOS, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 1:15-CV-00787-LY
	§	
THE COLISEUM, INC.,	§	
d/b/a EL COLISEO, et al,	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION AND NOTICE TO CLASS [Doc. 57]
(Subject to Hinojosa's Rule 12(b)(6) Motion)
AND REQUEST FOR EVIDENTIARY HEARING

Defendants The Coliseum, Inc. d/b/a El Coliseo ("The Coliseum") and Alfredo Hinojosa ("Hinojosa") (collectively, "Defendants") file their Response to *Plaintiffs' Amended Motion for Conditional Certification of Collective Action and Notice to Class* [Doc. 57], subject to Hinojosa's Rule 12(b)(6) Motion, and their Request for Evidentiary Hearing as follows:

REQUEST FOR EVIDENTIARY HEARING

1. Pursuant to Local Rule CV-7(h), Defendants request an oral hearing on Plaintiffs' Amended Motion for Conditional Certification. Based on the failure of Plaintiffs' allegations and evidence to provide a colorable basis that all the putative members of the collective action sustained injury from one unlawful policy, Defendants object to conducting this litigation in two phases. Plaintiffs must show a colorable basis for their claim that a class of similarly situated plaintiffs based on identifiable facts or legal nexus that bind the claims so that hearing the cases together promotes judicial efficiency before the potentially needless increase in costs occurs from conditional certification.

2. At this stage, courts generally refuse to consider a defendant's arguments on the merits. *Rafeedie v. L.L.C., Inc.*, No. A-10-CA-743-LY, 2011 U.S. Dist. LEXIS 116719, at *5 (W.D. Tex. May 9, 2011) (Yeakel J.) However, consideration of the defendants' evidence is allowed. *See, e.g., Dudley v. Tex. Waste Sys., Inc.*, 2005 U.S. Dist. LEXIS 9168 at *2 (W.D. Tex. May 16, 2005) (refusing to conditionally certify collective action because evidence adduced by the employer conclusively established the existence of a lawful policy).

3. Based on The Coliseum's records, Defendants strongly believe that Plaintiffs' claims cannot be established and certainly cross-examination would provide the Court with the perspective to determine whether conditional certification is appropriate. Simply, judicial economy and the needless increase of litigation costs do not warrant a two-step process and Defendants seek to conduct discovery now to attempt to conclude the case. Defendants respectfully request an evidentiary hearing for the opportunity to cross examine the three Named Plaintiffs who filed Declarations in support of Plaintiffs' Motion. A relatively brief cross-examination of the Named Plaintiffs will yield conclusive evidence sufficient to resolve the determination of Plaintiffs' entitlement to a collective action, particularly with respect to the Defendants where Plaintiffs have no employment connection and the tip credit issue.

PLAINTIFFS HAVE NOT STATED A VALID FLSA CLAIM.

4. On a motion for conditional certification of a collective action, the court first carefully considers the plaintiffs' allegations in the complaint regarding an alleged single policy or practice along with evidence submitted. *Hickson v. United States Postal Serv.*, No. 5:09CV83, 2010 U.S. Dist. LEXIS 104112, at *26 (E.D. Tex. July 53, 2010), *adopted by and conditional certification denied by* 2010 U.S. Dist. LEXIS 104120. Before analyzing whether to conditionally certify a collective action, the court considers whether the plaintiffs have failed to state an FLSA

violation. *Hickson*, 2010 U.S. Dist. LEXIS 104112, at *7–8 (citations omitted). Neither the remedial purposes of the FLSA nor the interests of judicial economy are advanced if the court overlooks facts suggesting that a collective action is improper. *Id.* at *7. Hinojosa incorporates by reference his respective Rule 12(b)(6) Motion to Dismiss Plaintiffs' Third Amended Complaint regarding Plaintiffs' failure to state a proper FLSA claim against him. [Doc. 54.]

STANDARD FOR CONDITIONAL CERTIFICATION

5. Most district courts in the Fifth Circuit, including the Western District, have generally adopted the *Lusardi* approach to certifying FLSA collective actions. *Morgan v. Rig Power, Inc.*, No. 7:15-CV-73-DAE, 2015 U.S. Dist. LEXIS 166644, at *6 (W.D. Tex. December 10, 2015) (citing *Lusardi v. Xerox*, 118 F.R.D. 351, 359 (D.N.J. 1987)). Under the *Lusardi* test, a district court approaches the question of whether the potential plaintiffs are "similarly situated" through an *ad hoc* two-stage analysis. *Pedigo v. 3003 S. Lamar, LLP*, 666 F. Supp. 2d 693, 697 (W.D. Tex. 2009) (citing *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995), *overruled on other grounds, Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90–91, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003)). The two stages of the *Lusardi* test are the "notice stage" and the "decertification stage." *Id.*

6. In the first stage, the court determines whether notice of the action should be sent to potential opt-in class members. *Id*. This decision is based solely on the pleadings and affidavits. *Pedigo*, 666 F. Supp. 2d at 697. The court must decide if the plaintiffs have established a "colorable basis" for their claim that a class of similarly situated plaintiffs exists. *Id*. While the notice stage standard is lenient, it is not automatic. *In re Wells Fargo Wage & Hour Empl. Practices Litig.*, No. H-11-5366, 2012 U.S. Dist. LEXIS 112769, at *72 (S.D. Tex. August 10, 2012). Ultimately, there must be "identifiable facts or legal nexus [that] bind the claims so that hearing the cases together

promotes judicial efficiency." *Simmons v. T-Mobile USA, Inc.*, No. H-06-1820, 2007 U.S. Dist. LEXIS 5002, at *18 (S.D. Tex. January 24, 2007).

7. The court requires at least "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan . . . ." *Mooney*, 54 F.3d at 1214 n.8. Courts deciding whether plaintiffs have established substantial allegations have considered factors such as whether potential plaintiffs were identified, whether affidavits of potential plaintiffs were submitted, and whether evidence of a widespread discriminatory plan was submitted. *Valcho v. Dall. Cnty. Hosp. Dist.*, 574 F. Supp. 2d 618, 653 (N.D. Tex. 2008) (citing *H&R Block v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999). The plaintiffs bear the burden of presenting preliminary facts showing that a similarly situated group of potential plaintiffs exist. *Hickson* at *19. Notice is appropriate if the court concludes there is "some factual nexus which binds the named plaintiffs and potential class members together as victims of a particular alleged [policy or practice]." *Id.* (citing *Villatoro v. Kim Son Restaurant, L.P.*, 286 F. Supp. 2d 807, 810 (S.D. Tex. 2003)).

Duty to Prevent a Frivolous Fishing Expedition

8. In deciding whether the plaintiffs have met the requirements of the *Lusardi* approach, the court, like practicing attorneys, has a responsibility to refrain from stirring up unwarranted litigation. *H&R Block,* 186 F.R.D. at 401. The court must ensure that an employer is not unduly burdened by a "frivolous fishing expedition" conducted by the plaintiff at the employer's expense. *Valcho*, 574 F. Supp. 2d at 653. Although it is subject to correction at the decertification stage, a decision to certify at the notice stage is not inconsequential, because too much leniency can result in conditional certification that must be revoked on the eve of trial when it becomes obvious that manageability concerns make collective action impossible. *In re Wells Fargo*, 2012 U.S. Dist. LEXIS 112769, at *60. Thus, the preliminary factual showing must be

based on competent evidence to avoid instigating unwarranted litigation. *Hickson* at *19. "Without such a requirement, it is doubtful that [29 U.S.C.] § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse." *Id.* (quoting *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1270 (M.D. Ala. 2004)).

PLAINTIFFS AND THE PUTATIVE COLLECTIVE CLASS ARE NOT SIMILARLY SITUATED.

PLAINTIFFS AND THE PUTATIVE CLASS WERE NOT SUBJECT TO A SINGLE DECISION, PRACTICE, OR PLAN.

9. The purpose of the "similarly situated" requirement is to ensure that a collective action will promote the economy of scale that the FLSA envisions. *McCloud v. McClinton Energy Grp., L.L.C.*, No. 7:14-CV-120, 2015 U.S. Dist. LEXIS 20374, at *15 (W.D. Tex. February 20, 2015). Employees must produce evidence establishing, not just allege, a colorable basis for their claim that the putative class members were together the victims of a "single decision, policy, or plan." *Hickson* at *21–23; *Simmons*, 2007 U.S. Dist. LEXIS 5002, at *19 (*citing Mooney* at 1214 n.8). They must show some factual basis beyond the mere averments in their complaint for the class allegations. *Hickson* at *53. The Court first carefully considers the plaintiffs' allegations in the complaint regarding an alleged single policy or practice and then considers the evidence submitted in support of their allegations. *Id.* at *26.

10. Instead of alleging a single practice or policy, Plaintiffs aver two different bases for violation of the FLSA minimum wage requirements through six purported practices:

First Basis:

Allegation in the Complaint

> "Hinojosa personally ordered The Coliseum's management to have the Plaintiffs and Class Members punched out of the time clock, requiring them to work off the clock without pay while they cleaned the venue after closing time, which is one of

the wage violations that are the basis of this lawsuit." [Doc. 53 at ¶ 18.] "Defendants regularly failed to pay the Plaintiffs and Class Members for all of the hours they worked." [*Id*. at ¶ 24.]

Evidence Attached to the Motion

(1) **Nonpayment for all hours worked.** "My coworkers and I were not paid for all of the hours that we worked at El Coliseo. . . . [O]ur paychecks frequently did not reflect all our recorded hours worked."

Granados Declaration at ¶ 10 [Doc. 57-1 at 2]; *see also* Rubio Declaration at ¶ 7 [Doc. 57-2 at 1]; *see also* Camargo Declaration at ¶ 6 [Doc. 57-3 at 1];

(2) **Management ("Tony") clocking employees out early.** "[M]anagement regularly failed to record all of our hours worked. . . . Beto would regularly instruct Tony to punch us out despite the fact that we were still working."

Granados at ¶ 11 [Doc. 57-1 at 2–3]; *see also* Rubio at ¶ 8 [Doc. 57-2 at 2]; *see also* Camargo at ¶ 7 [Doc. 57-3 at 1–2];

(3) **Instructed to clock out early.** "[O]n other occasions, managers. . . would approach us individually while we were still working and direct us to clock out, despite the fact that we were not finished with our work and would have to continue after clocking out."

Camargo at ¶ 7 [Doc. 57-3 at 2].

Second Basis:

Allegations in the Complaint

"Defendants regularly failed to pay the Plaintiffs and Class Members the minimum wage of $7.25 per hour." [Doc. 53 at ¶ 23.] "In every work week subject to this litigation, Defendants paid the Plaintiffs and Class Members hourly rates of less than $7.25 and claimed a tip credit in order to comply with the minimum wage requirement." [Doc. 53 at ¶ 28.] "Defendants, acting through their agents or employees, regularly kept the tips that patrons paid to the Plaintiffs and Class Members by credit or debit card." [Doc. 53 at ¶ 29.] "Defendants' misappropriation of the Plaintiffs' and Class Members credit and debit card tips was the result of a pattern or practice that the Defendants maintained knowingly, willfully, or with reckless disregard to the law." [Doc. 53 at ¶ 30.] "The Class Members were not paid the minimum wage." [Doc. 53 at ¶ 53.] "The Defendants' failure to pay the minimum wage to the Plaintiffs and the Class Members results from the same pattern or practice. Although damages may vary from between individual Plaintiffs and Class Members, the common nucleus of facts regarding liability remains." [Doc. 53 at ¶ 54.]

Evidence attached to the Motion

(4) **Nonpayment of tips for training**. "I was only paid $5.00 per hour for my training. . . . I received no tips in addition to these wages."

Granados at ¶ 5 [Doc. 57-1 at 1];

(5) **Management closing registers when bartenders did not timely enter their tips.** "The managers at El Coliseo regularly retained some of my tips. Due to the cumbersome nature of the system in place to enter customers' credit or debit card tips into the register, it was routinely impossible to enter all of the credit card tips I received while the bar was open. Once the bar was closed for business, the managers. . . regularly refused to allow me to enter all of my credit card tips before closing out my register. . . ."

Granados at ¶ 12 [Doc. 57-1 at 3]; *see also* Rubio at ¶ 9 [Doc. 57-2 at 2];

(6) **Register shortages/overages taken from tips.** "[I]f our registers had cash shortages or overages of more than $20.00 at the end of the shift, the management took the amount of the imbalance in excess of $20.00 from our tips."

Granados at ¶ 13 [Doc. 57-1 at 3]; *see also* Rubio at ¶ 10 [Doc. 57-2 at 2];

11. Plaintiffs' Complaint alleges that Defendants' failure to pay minimum wage results from the same pattern or practice but then claims that Defendants both failed to pay Plaintiffs for all hours worked and that Defendants retained some of their tips. Further, their Declarations purport six practices, some of which do not apply to each Plaintiff. With two different bases for violation of the FLSA by six different alleged practices, there can be no "common nucleus of facts regarding liability." [*See* Doc. 53 at ¶ 54.] Plaintiffs' proposed Notice to the class attached to their

Motion lists the two general claims of wrongdoing (neither of which is specific to any actual practice or procedure) as follows:

What Is This About?

> The workers who brought this case say that:
> - Management kept some of their tips.
> - They weren't paid for all of the hours they actually worked.
>
> [Doc. 57-4.]

Plaintiffs' proposed Notice demonstrates the lack of a common factual nexus binding the Plaintiffs together because some employees opting in may claim that management kept some of their tips without claiming that they were not paid for all of the hours they worked. Others may claim the opposite. A third group may claim they experienced both incidents.

12. Furthermore, if Plaintiffs' Declarations are true, then some opt-ins may claim that they were not paid for all ours worked because management clocked them out early. Others may claim that management never clocked them out early, but that their paychecks did not always reflect all hours recorded on their time cards. Other opt-ins may claim that, although shortages in their registers were taken from their tips, they were never denied the opportunity to or unable to enter their credit card tips into the cash register system. Still, others may opt-in, saying that the only practice they experienced was not being paid their tips during training when first hired. Any opt-in could claim any combination of the six practices Plaintiffs have claimed, and there are 64 different combinations possible.[1]

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[1] $|P(S)| = 2^n = 2^6 = 64$

13. Plaintiffs' allegations regarding nonpayment for all hours worked and management clocking employees out early do not relate to the alleged nonpayment of credit/debit card tips. Plaintiffs' allegations about management retaining their tips when Plaintiffs failed to enter them into the cash register system are limited to credit and debit card tips (not cash) because of the unique process involved with tips placed on credit or debit cards. Granados' alleged nonpayment of tips for training and Granados and Rubio's claims that their register shortages/overages being taken from tips are not limited to credit and debit card tips. Plaintiffs' Declarations have alleged numerous practices sharing little, if any, commonality. *See Hickson* at *27–28.

14. Plaintiffs' allegations, both as to their variety and vagueness, create endless variations of these types of scenarios, making each class member's claims highly individualized. *See id.* at *29. Plaintiffs' allegations, evidence, and, most importantly, vague "fishing expedition"-type allegations in the proposed Notice demonstrate that the Plaintiffs are not similarly situated because there is no common factual nexus binding them and the potential class members together as victims of a single alleged policy or practice. *See id.* at *29 (denying Plaintiffs' motion for conditional certification).

THE WRONGFUL PRACTICES THE PLAINTIFFS ALLEGE WERE NOT ENTERPRISE-WIDE OR APPLICABLE TO BOTH BARTENDERS AND BARBACKS.

15. Only Granados claims that he was not paid tips during his training, and he does not claim that other employees at The Coliseum were subject to the same "practice." [*See* Doc. 57-1 at ¶ 5.] Further, he does not claim, and does not offer facts suggesting, that this alleged practice affected barbacks. Because he was shadowing another bartender, it cannot be assumed that he owed tips to a barback during training.

16. Only Camargo alleges that he was instructed to clock himself out early. [*See* Doc. 57-3 at ¶ 7.] Although he states that management would approach "us individually" and direct "us" to clock out, he does not specify who "us" is. One might surmise that he is referring to other barbacks like himself, but there are no facts implying that "us" includes bartenders, whose job responsibilities differ from barbacks, to suggest that they were also subject to this practice.

17. Such a constricted sampling of putative class members fails to support the Plaintiffs' assertion of widespread FLSA violations which, purportedly, result from a common policy or plan. *Thompson v. Speedway SuperAmerica LLC*, No. 08-1107 (PJS/RLE), 2008 U.S. Dist. LEXIS 115050, at *15 (D. Minn. August 21, 2008). *See also*,

- *West v. Border Foods, Inc.*, No. 05-2525 (DWF/RLE), 2006 U.S. Dist. LEXIS 96963, at *19 (D. Minn. 2006) (denying conditional certification where only "six (6) of the potential class of approximately 240 shift managers, who are employed at Pizza Hut restaurants owned by the Defendants—2.5 per cent of the potential class—were allegedly required by their store managers to work off-the-clock");

- *Harrison v. McDonald's Corp.*, 411 F. Supp.2d 862, 870–71 (S.D. Ohio 2005) (averments from two (2) employees who claimed FLSA violations, out of a potential class of 300, were insufficient to allow for conditional certification);

- *Flores v. Lifeway Foods, Inc.*, 289 F. Supp. 2d 1042, 1046 (N. D. Ill. 2003) (evidence that demonstrated an employer's payment practices with respect to two employees out of fifty did not amount to "even a 'modest factual showing' of a common policy or plan" for conditional certification).

18. When referring to this alleged practice, Plaintiffs claim in their Motion that "Defendants regularly retained *some* of the bartenders' credit and debit card tips. . . ." [Doc. 57 at 6 (emphasis added)]. Thus, Plaintiffs' Motion further suggests that not all bartenders were subject to this alleged policy and that only "some" of the credit and debit card tips were retained. Their Motion contradicts their allegation that this was an enterprise-wide practice because not all bartenders were subject to it—only "some" and/or not all credit and debit card tips were retained—

only "some," with no further facts allowing the court to ascertain that it was enough to constitute a practice or policy.

19. Plaintiffs' Declarations that "all of [the bartenders and barbacks at the time and formerly employed] experienced the same wage violations as I" is conclusory. [*See* Doc. 57-1 at ¶ 16; Doc. 57-2 at ¶ 12; Doc. 57-3 at ¶ 8.] Their "belie[f] [that] there are numerous others who would be interested in joining this suit if they knew about it" is also unsupported and speculative. [*Id.*] Plaintiffs' allegations of a single, unidentified policy and a few declarations stating they "believe" such a policy exists is insufficient. [*See* Doc. 57-1 at ¶ 57; Doc. 57-2 at ¶ 13; Doc. 57-3 at ¶ 9]; *See Hickson* at *43. Even if it is true that some individuals failed to receive appropriate compensation for hours which they worked, that sole fact does not lead one to conclude that there must be some unlawful enterprise-wide policy out there somewhere. *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303, 311 (D. Colo. 1998).

20. The purpose of an FLSA collective action is to bring similarly-situated employees who were subjected to the same policy or practice together in one case because it is more efficient than having the claims tried separately. *Hickson* at *29 (citing *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 570, 110 S. Ct. 482, 485 (1989)). Plaintiffs' broad-ranging allegations, on their face, show this purpose would be thwarted if this case were conditionally certified. *Id.* at *27–29. Plaintiffs' allegations and evidence fail to show that they and the putative collective action members are bound together as victims of a single, particular enterprise-wide policy that violates the FLSA. *Id.* at *29. Rather than demonstrate a similarity among the individual situations or show a factual nexus binding them, Plaintiffs' Declarations demonstrate that the putative collective action members have allegedly been victims of as many as six different practices with 64 combinations involving two different bases for minimum wage violations. *See id.* at *34.

PLAINTIFFS HAVE NOT SHOWN THAT THEY WERE SUBJECT TO A POLICY OR PRACTICE THAT WAS UNLAWFUL.

21. Plaintiffs' Complaint and Motion allege that Defendants "kept" or "retained" some of the bartenders' credit and debit card tips as follows:

> The managers at El Coliseo regularly retained some of my tips. Due to the high volume of customer interactions and the cumbersome nature of *the system in place to enter customers' credit or debit card tips into the register*, it was routinely impossible to enter all of the credit or debit card tips I received while the bar was open. Once the bar was closed for business, the managers, including Miguel, Pepe, and Beto, would come by the bars to close out the registers. Miguel, Pepe, and Beto regularly refused to allow me to enter all of my credit card tips before closing out my register, resulting in Defendants keeping this portion of my tips, as well as the allotment of these tips due to the bar backs who had worked with me.

[Doc. 57-1 at ¶ 3] (emphasis added); *see also* [Doc. 57-2 at ¶ 12.]

22. Granados and Rubio's Declarations suggest that they had the opportunity to enter their tips contemporaneously with the credit and debit card sales. Their claim that they were unable to do so, "due to the high volume of customer interactions and the cumbersome nature of the system" does not suggest a practice by The Coliseum and Hinojosa to deny them their tips. At most, it was the nature of Plaintiffs' jobs as bartenders and their personal dissatisfaction with The Coliseum's cash register system, neither of which is an unlawful employment practice. This is further shown by Granados' Declaration stating the following:

> My fellow bartenders at El Coliseo and I frequently complained to each other and to Ali about the fact that we were not being given all of our, and the bar backs', credit card tips. Ali responded that he would change *the system* to make it easier to enter our credit card tips during our shifts while the bars were open, but no such changes were implemented during my employment.
>
> [Doc. 57-1 at ¶ 14 (emphasis added).]
>
> I was working alongside two bartenders. . . . I complained to them about how we weren't getting to enter our tips while the bar was open. . . . They both indicated

that it was futile to complain to management because they wouldn't change *the system*.

[Doc. 57-1 at ¶ 15 (emphasis added).]

Granados' alleged complaints to management and other employees were about "the system [to enter customers' credit or debit card tips into the register]"—not an unlawful practice intended to deny them their tips. Further, it is not unlawful for an employer to require bartenders to enter their tips contemporaneously with credit and debit card sales, even if there is a "high volume of customer interactions" and the register system is "cumbersome." The Coliseum's practice is lawful and typical for all similarly employed workers across the country.

23. In addition to Plaintiffs' failure to support their claim that all employees were subject to the alleged practice(s), they fail to show that the incidents were necessarily policies of the Defendants, at all. In support of their claim that they were not paid for all hours worked, Plaintiffs provide no details about how often their paychecks did not reflect all the recorded hours they worked, a hint about the size of any shortfall, or how many other employees might have experienced it. Thus, the possibility of human error is just as likely as an enterprise-wide decision not to pay employees for all ours recorded. Similarly, Granados' isolated claim that he did not receive tips when he underwent bartender training offers no facts suggesting it was an enterprise-wide policy instead of a mistake. Further, Plaintiffs' claim that they did not receive tips because of the difficulty in entering them while working during heightened volumes of customer interactions and a "cumbersome" system is more similar to bartender error, inefficiency, or neglect, than an intentional practice to deny Plaintiffs their tips. *See Thompson,* 2008 U.S. Dist. LEXIS 115050, at *18 ("However, in our view, the Plaintiffs' allegations are insufficient to

establish either the existence of a central policy, or the performance of an identical, regularly-scheduled task, which would support the certification of a collective action.").

24. Plaintiffs allege they were sometimes instructed to clock out before they were finished with work. Without providing facts connecting this alleged practice, it is just as possible that these incidents, if true, were the result of a rogue manager. *See Hickson* at *42–43 ("Although Plaintiffs make various allegations that the USPS 'denied overtime compensation,' deleted 'clock rings,' and gave employees 'overburdened routes' requiring them to work through lunch and otherwise 'off the clock,' they have not submitted any evidence showing that the reason why the employees were not compensated for [these activities] is not because of human error or a rogue manager, but because of a corporate decision to ignore the minimum wage requirements."). Although Plaintiffs' Complaint alleges that Hinojosa instructed managers to clock employees out early [Doc. 53 at ¶ 18], their Declarations contain no evidence to support that assertion.

25. Plaintiffs' evidence fails to "provide a colorable basis that all the putative members of the collective action 'sustained injury from one unlawful policy." *Hickson* at *43. In fact, the Declarations from the Named Plaintiffs claim at least six different alleged practices, of which there are 64 different combinations, making "the individual circumstance of each employee too particularized to warrant collective certification [enterprise-wide]." *Hickson* at *43; *Saleen v. Waste Mgmt.*, No. 08-4959 (PJS/JJK), 2009 U.S. Dist. LEXIS 49891, at *18–19 (D. Minn. June 15, 2009) ("The import of these differences is plain: the myriad reasons alleged why the deponents and declarants were not paid for untaken meal breaks do not provide a colorable basis that Plaintiffs and potential collective action members were together the victims of a single decision, policy, or plan."). Plaintiffs attempt to identify the Defendants' policy or practice broadly, namely the failure of Defendants to pay minimum wage to bartenders and barbacks. However, Plaintiffs' showing

demonstrates that there is no single policy or practice about that core issue from which a collective action can emanate. *Hickson* at *46 (citing *Saleen* 2009 U.S. Dist. LEXIS 49891 at *19.)

26. Although the proper inquiry at this stage is not whether individual issues predominate over common issues, rather, it is whether Plaintiffs have shown a colorable basis that there is a single decision, policy, or plan affecting all of the individual employees, which would make it sensible to conditionally certify. *See Saleen*, 2009 U.S. Dist. LEXIS 49891, at *21–22. To the extent that the Court looks at the many individual reasons given by the Plaintiffs for their not getting paid for all hours worked or not getting paid their tips, it is only to determine whether Plaintiffs have made a colorable showing that the putative collective is similarly situated. *Id.* at *22. Where the collective action requires such significant individual considerations, conditional certification may be inappropriate. *Id*. This is not a situation where the Court's examination of the parties' factual submissions and arguments requires the Court to weigh the merits of Plaintiffs' claims, make factual findings, or make credibility determinations in its review of the record. Rather, the Plaintiffs' allegations allow the Court to simply conclude that they do not provide a colorable basis that all the putative members of the collective action sustained injury from one unlawful policy. *Id.* at *21.

SUMMARY

27. The power to authorize notice must be exercised with discretion and only in appropriate cases. *Hickson* at *50; *See Haynes vs. Singer Co*., 696 F.2d 884, 886 (11th Cir. 1983). Considering Plaintiffs' failure to provide a colorable basis that they and the putative members of the collective action are similarly situated with respect to a single policy, practice, or decision, this case is more appropriate for individualized actions. *Hickson* at *50–51.

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED NOTICE TO PUTATIVE CLASS MEMBERS.

28. **Description of the case**. Defendants object to the description of the case in the "What is This About?" section of their proposed Notice. [Doc. 57-4]. As described above, such a notice is a vaguely written fishing expedition. The Notice lists two different types of violations. Some opt-ins may allege they are affected by one violation, the other, or both, without addressing whether such violation was the result of the same alleged practice or policy as other putative class members. *See Harris v. Hinds Cnty.*, No. 3:12-cv-00542-CWR-LRA, 2014 U.S. Dist. LEXIS 14576, at *24–25 (S.D. Miss. February 4, 2014) ("The Court, however, deems it appropriate for the Notice to refer to the alleged improper compensatory time policy, in accordance with the Defendants' objection. . . ."). Without specifying a single practice in the Notice by which the potential class members were the alleged victims of an FLSA violation, the results of Plaintiffs' Notice will be varied and highly individualized. The law requires a showing, however rudimentary, that the Plaintiffs are similarly situated for a collective action to be conditionally certified. The purpose of the "notice stage" is to identify people—not policies, practices, or violations. It is to identify those who fall into the already identified and described class that was necessary to obtain conditional certification in the first place. Therefore, the Notice resulting from that certification must be tailored to identify those similarly situated employees—not a broader range of employees, which would defeat similarity from the start and waste judicial resources. If the Plaintiffs were the victims of a single practice or policy that violated the FLSA and have satisfactorily demonstrated this for the "notice stage" of a collective action, then specifically identifying that single enterprise-wide practice in the Notice should be simple for the Plaintiffs. More importantly, it is required. Otherwise, conditional certification of the collective action is only a fishing expedition for them.

29. **Reference to night "clubs."** Defendants object to the reference to in the "What is This About" section that workers may receive money if they win at trial or settle with the night "clubs." Plaintiffs' Complaint is against only one club, The Coliseum. Similarly, Defendants also object to the "What Happens if I Don't File a Claim" section stating that if they are owed wages, the workers could sue the night "clubs" on their own.

30. **The Court's "approval" of the Notice**. Defendants object to the Notice stating that the Court has "approved" any notice. Instead, it should state that the Court has "authorized" the notice. Court intervention in the notice process for case management purposes is distinguishable in form and function from the solicitation of claims. *Hoffmann-La Roche*, 493 U.S. at 169. In exercising the discretionary authority to oversee the notice-giving process, courts must scrupulously respect judicial neutrality and take care to avoid even the appearance of judicial endorsement of the merits of the action. *Id*. at 574.

31. **Notice by email**. Defendants object to the Notice being sent to potential class members by email. The Notice will be sent by regular mail, so sending it by email is repetitive and, therefore, coercive. Further, notice by email is subject to being forwarded without limit on its dissemination. Defendants have the right to not have Plaintiffs' disputed and unproven allegations unnecessarily broadcast in a manner that may be harmful to the business and that does not materially advance the notice purposes of the action. *In re Wells Fargo*, 2013 U.S. Dist. LEXIS 70040, at *7.

32. **Posting of the Notice at the night club**. Defendants object to posting of the Notice at its night club as doing so would be repetitive and oppressive. *In re Wells Fargo* at *7–8.

33. **Notice by radio.** Defendants object to the Notice being broadcast by radio because it is unnecessarily repetitive and oppressive. Plaintiffs are asking the Court to approve that Notice

be provided by regular mail, email, inclusion with paychecks, posting on The Coliseum's premises, posting on its website, and radio. Some potential opt-ins will, therefore, receive notice by up to six different means, especially if notice on The Coliseum's premises, on its website, and by radio continues for 60 to 90 days. There is a difference between notice and bombardment. All of the cases to which Plaintiffs cite regarding radio notice involve migrant farm workers, who tend to be transitory and often semi-illiterate, thus making notice by mail, email, and internet unreliable. *See Montelongo v. Meese*, 803 F.2d 1341, 1352 (5th Cir. 1986) ("Given the mobile, semi-literate character of the [migrant farm worker] class, these efforts fully satisfied the dictates of Rule 23(c).") Further, farm workers do not typically have indoor workplaces where notice could be posted. Plaintiffs do not show any circumstances similar to the cases on which they rely to make notice by radio necessary or proper in this case.

34. **90 day notice period**. Defendant objects to the Notice period being 90 days and requests that it be 60 days because that is sufficient to provide notice while reducing the fishing expedition and potential harm to Defendants' business. Although opt-in periods commonly range from as little as 30 to as many as 120 days, most courts appear to default to a notice period of 60 days, unless potential plaintiffs are difficult to contact because of their locations or other extenuating factors warrant additional time, which Plaintiffs do not allege here. *McCloud v. McClinton Energy Grp., L.L.C.*, No. 7:14-CV-120, 2015 U.S. Dist. LEXIS 20374, at *27–28 (W.D. Tex. February 20, 2015) (internal citations omitted).[2]

[2] *See also Heeg v. Adams Harris, Inc.*, 907 F. Supp. 2d 856, 865 (S.D. Tex. 2012) (granting request for 60 day opt-in period); *Sims v. Housing Auth. City of El Paso*, No. EP-10-CV-109-KC, 2010 U.S. Dist. LEXIS 72879, 2010 WL 2900429, at *5 (W.D. Tex. July 19, 2010) (finding 60 day opt-in period reasonable); *Mims v. Carrier Corp.*, No. 2:06-CV-206, 2008 U.S. Dist. LEXIS 25943, 2008 WL 906335, at *1 (E.D. Tex. Mar. 31, 2008) (granting 60 day opt-in period).

35. **Members' right to select their own attorney**. Defendants object to the Notice failing to inform the potential plaintiffs that they may choose their own attorney. The "What Happens if I File a Claim?" section should state the following:

> You have the right to contact any attorney of your choosing to discuss the case, or you may contact the current Plaintiffs' counsel.

See e.g., Morgan, 2015 U.S. Dist. LEXIS 166644, at *57; *Tolentino v. C&J Spec-Rent Servs. Inc.*, 716 F. Supp. 2d 642, 655 (S.D. Tex. 2010).

36. **Explanation of attorney's fees**. Defendants object that the comment in the Notice about liability for attorney's fees is not limited to Plaintiffs' counsel and does not explain how Plaintiffs may have to pay Plaintiffs' counsel's fees. Instead, the Notice should state as follows:

> The attorneys for the Plaintiffs in this case are being paid on a contingency fee basis, which means that if there is no recovery, then they will receive no attorneys' fees. If there is a recovery, then the attorneys for the Plaintiffs will either receive part of the Plaintiffs' recovery, or they will seek to have their attorneys' fees and case expenses paid by the Defendants.

In re Wells Fargo at *24–25.

37. **Plaintiffs' obligations in the suit.** Defendants object to the Notice failing to inform the potential plaintiffs that the may be required to provide sworn deposition testimony and respond to written discovery requests to substantiate their claims. In the "What Happens if I File a Claim?" section, the Notice should state the following:

> You may be required to give a sworn deposition, respond to written discovery, and testify in court under oath.

Behnken v. Luminant Mining Co., LLC, 997 F. Supp. 2d 511, 524–25 (N.D. Tex. 2014); *See, e.g., Whitehorn v. Wolfgang's Steakhouse, Inc.*, 767 F. Supp. 2d 445, 540 (S.D.N.Y. 2011). The class members should understand that they will have to provide sworn testimony and evidence to substantiate their claim(s).

38. **Defendants' position in the case.** Defendants object to the reference in the "What is This About?" section of the Notice that "The *owners* deny all of this." (emphasis added). First, the Plaintiffs have only made one owner a party to their Complaint, Hinojosa. Second, The Coliseum, not just Hinojosa, also denies Plaintiffs' allegations. It would be more accurate to state that "The Defendants deny these allegations." Defendants also object to the Notice failing to state the Defendants' position in his case beyond mere denial. However, because the "What is This About?" section does not comply with the requirement that the potential opt-ins be subject to a single practice, the Defendants cannot adequately state their defenses to Plaintiffs' broad-based allegations in the Notice. *See e.g. Morgan* at *15–16.

39. **Plaintiffs returning their consents to the Plaintiffs' attorneys instead of the Court**. Defendants object to the Notice requiring the potential plaintiffs to send their completed consent forms to the current Plaintiffs' attorneys instead of the Court if those plaintiffs have not retained the current Plaintiffs' counsel as their attorneys. *Morgan* at *57.

PRAYER

The Defendants respectfully request that the Court:

a. Grant Defendants' request for an evidentiary hearing on Plaintiffs' Amended Motion for Conditional Certification of Collective Action [Doc. 57];

b. Deny Plaintiffs' Amended Motion for Conditional Certification of Collective Action;

c. Alternatively, if the Court should grant Plaintiffs' Motion, then Defendants pray that the Court sign an order sustaining Defendants' objections to the Plaintiffs' proposed Notice to the class; and

d. Such other or further relief to which Defendants may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the document above was served on the following parties by email via the CM/ECF system on September 19, 2016:

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